



## ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2014-0798; FRL-9939-92-OAR]

### California State Nonroad Engine Pollution Control Standards; Portable Diesel-Fueled Engines Air Toxics Control Measure; Notice of Decision

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of Decision.

**SUMMARY:** The Environmental Protection Agency (“EPA”) is granting the California Air Resources Board’s (“CARB”) request for authorization of amendments to its Portable Diesel-Fueled Engines Air Toxics Control Measure (“Portable Engine Amendments”).

EPA is also confirming that certain Portable Engine Amendments are within the scope of a prior EPA authorization. CARB’s Portable Engine Amendments apply to in-use, portable, off-road<sup>1</sup> diesel-fueled engines rated 50 brake horsepower (bhp) and greater. This decision is issued under the authority of the Clean Air Act (“CAA” or “Act”).

**DATES:** Petitions for review must be filed by [INSERT DATE SIXTY DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2014-0798. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30

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<sup>1</sup> The federal term “nonroad” and the California term “off-road” may be used interchangeably herein.

a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's website is <http://www.epa.gov/oar/docket.html>. The electronic mail (email) address for the Air and Radiation Docket is: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov), the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the [www.regulations.gov](http://www.regulations.gov) website, enter EPA-HQ-OAR-2014-0798 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality ("OTAQ") maintains a webpage that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver *Federal Register* notices, some of which are cited in today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

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**SUPPLEMENTARY INFORMATION:**

**I. Background**

California initially adopted its Portable Engine regulations on February 26, 2004 as part of a broad California program to reduce emissions of diesel particulate matter. The regulations applied to in-use, portable, off-road diesel-fueled engines rated 50 brake horsepower (bhp) and greater. “Portable engines” are engines that may be moved easily from location to location.<sup>2</sup> Subject engines were required to be certified to certain emission standards by January 1, 2010, unless the engines were designated as low-use engines or as engines exclusively used in emergency applications. Fleets of in-use diesel-fueled portable engines were required to meet fleet-average standards for diesel PM emissions that become increasingly more stringent in 2013, 2017, and 2020. The initial Portable Engine air toxic control measure (ATCM) became operative under state law on March 11, 2005<sup>3</sup> and EPA authorized the regulations on November 29, 2012.<sup>4</sup>

CARB adopted the 2007 amendments on July 31, 2007, and they became effective on September 12, 2007. The 2007 amendments were designed to extend temporary, emergency provisions CARB had adopted to address the inability of owners and operators to permit or register older engines that did not satisfy the Portable Engine certification requirement to meet the most stringent federal or California emission standards. The 2007 amendments addressed this issue by (i) granting discretion to local air districts to permit or register uncertified portable engines that were operated in California within a designated time period prior to October 1, 2006, or that were low-use engines or used exclusively in emergency applications, (ii) allowing Tier 1 and Tier 2 engines that were in operation within a designated time period prior to October 1, 2006, but did not meet the most stringent emission requirements, to be permitted or registered

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<sup>2</sup> 77 FR 72846, 72847 (December 6, 2012).

<sup>3</sup> The Portable Engine ATCM is set forth at 17 CCR 93116 et seq.

<sup>4</sup> 77 FR 72846 (December 6, 2012).

until December 31, 2009, and (iii) otherwise providing additional compliance flexibility.

In 2008, CARB adopted an In-Use Off-Road regulation<sup>5</sup> and a Truck and Bus regulation.<sup>6</sup> CARB then amended the Portable Engine regulations to exempt certain engines (viz., secondary engines on two-engine cranes and two-engine sweepers, and on lattice boom cranes) that instead became subject to either the In-Use Off-Road regulation or the Truck and Bus regulation. CARB formally adopted the amendments to the Portable Engine ATCM on October 19, 2009 (the 2009 amendments).

California formally approved the 2010 amendments to the Portable Engine ATCM regulations on October 19, 2010 and January 20, 2011. The 2010 amendments became operative under state law on February 19, 2011. The 2010 amendments provided further compliance flexibility, and clarified or modified other aspects of the regulations. For example, some entities were allowed to operate a limited number of non-certified engines for an additional year, through December 31, 2010. Additional regulatory relief was provided for engines that were permitted or registered prior to January 1, 2010. The amendments provided for permitting of portable engines that were certified to standards for new on-road engines. Auxiliary deck engines on water well drilling rigs were exempted and instead made subject to CARB's In-Use Off-Road Regulation. Portable engines used exclusively on dedicated snow removal vehicles were also exempted. Low-use and emergency use engines were required to be removed or replaced with a current tier engine by January 1, 2017. The 2010 amendments also deleted the provision that had allowed local air districts, in their discretion, to permit non-certified engines that had operated between March 1, 2004 and October 1, 2006. The amendments specified

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<sup>5</sup> The California In-Use Off-Road regulation is set forth at 13 CCR 2449 et seq.

<sup>6</sup> The California Truck and Bus regulation is set forth at 13 CCR 2025 et seq.

particulate matter (PM) emission factors for certain engines, which are used to help determine fleet average standards. Finally, the 2010 amendments provided relief for certified engines that lost their permit exemption due to changes in local air district rules.

By letter dated September 15, 2014, CARB submitted a request to EPA pursuant to section 209(e) of the Act for confirmation that the 2007, 2009, and 2010 amendments fall within the scope of EPA's previous authorization, or, in the alternative, that EPA grant a full authorization for those amendments.

*A. Clean Air Act Nonroad Engine and Vehicle Authorizations*

Section 209(e)(1) of the Act permanently preempts any state, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain *new* nonroad engines or vehicles.<sup>7</sup> For all other nonroad engines (including “non-new” engines), states generally are preempted from adopting and enforcing standards and other requirements relating to the control of emissions, except that section 209(e)(2)(A) of the Act requires EPA, after notice and opportunity for public hearing, to authorize California to adopt and enforce such regulations unless EPA makes one of three enumerated findings. Specifically, EPA must deny authorization if the Administrator finds that (1) California’s protectiveness determination (i.e., that California standards will be, in the aggregate, as protective of public health and welfare as applicable federal standards) is arbitrary and capricious, (2) California does not need such standards to meet compelling and extraordinary conditions,

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<sup>7</sup> States are expressly preempted from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from new nonroad engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower. Such express preemption under section 209(e)(1) of the Act also applies to new locomotives or new engines used in locomotives.

or (3) the California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

On July 20, 1994, EPA promulgated a rule interpreting the three criteria set forth in section 209(e)(2)(A) that EPA must consider before granting any California authorization request for nonroad engine or vehicle emission standards.<sup>8</sup> EPA revised these regulations in 1997.<sup>9</sup> As stated in the preamble to the 1994 rule, EPA historically has interpreted the consistency inquiry under the third criterion, outlined above and set forth in section 209(e)(2)(A)(iii), to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) of the Act.<sup>10</sup>

In order to be consistent with section 209(a), California's nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California's nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same "consistency" criteria that are applied to motor vehicle waiver requests under section 209(b)(1)(C). That provision provides that the Administrator shall not grant California a motor vehicle waiver if she finds that California "standards and accompanying

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<sup>8</sup> See "Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards," 59 FR 36969 (July 20, 1994).

<sup>9</sup> See "Control of Air Pollution: Emission Standards for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts; Preemption of State Regulation for Nonroad Engine and Vehicle Standards; Amendments to Rules," 62 FR 67733 (December 30, 1997). The applicable regulations are now found in 40 CFR part 1074, subpart B, section 1074.105.

<sup>10</sup> See *supra* note 8. EPA has interpreted 209(b)(1)(C) in the context of section 209(b) motor vehicle waivers.

enforcement procedures are not consistent with section 202(a)” of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures will be found to be inconsistent with section 202(a) if (1) there is inadequate lead time to permit the development of the necessary technology, giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.

In light of the similar language of sections 209(b) and 209(e)(2)(A), EPA has reviewed California’s requests for authorization of nonroad vehicle or engine standards under section 209(e)(2)(A) using the same principles that it has historically applied in reviewing requests for waivers of preemption for new motor vehicle or new motor vehicle engine standards under section 209(b).<sup>11</sup> These principles include, among other things, that EPA should limit its inquiry to the three specific authorization criteria identified in section 209(e)(2)(A),<sup>12</sup> and that EPA should give substantial deference to the policy judgments California has made in adopting its regulations. In previous waiver decisions, EPA has stated that Congress intended EPA’s review of California’s decision-making be narrow. EPA has rejected arguments that are not specified in the statute as grounds for denying a waiver:

The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in California air quality not commensurate with its costs or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more

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<sup>11</sup> See *Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1087 (D.C. Cir. 1996): “... EPA was within the bounds of permissible construction in analogizing §209(e) on nonroad sources to §209(a) on motor vehicles.”

<sup>12</sup> See *supra* note 7, at 36983.

stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.<sup>13</sup>

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.<sup>14</sup> Thus, EPA's consideration of all the evidence submitted concerning an authorization decision is circumscribed by its relevance to those questions that may be considered under section 209(e)(2)(A).

If California amends regulations that were previously authorized by EPA, California may ask EPA to determine that the amendments are within the scope of the earlier authorization. A within-the-scope determination for such amendments is permissible without a full authorization review if three conditions are met. First, the amended regulations must not undermine California's previous determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 209 of the Act, following the same criteria discussed above in the context of full authorizations. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations.<sup>15</sup>

### *B. Deference to California*

In previous waiver and authorization decisions, EPA has recognized that the intent of Congress in creating a limited review based on the section 209(b)(1) criteria was

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<sup>13</sup> "Waiver of Application of Clean Air Act to California State Standards," 36 FR 17458 (Aug. 31, 1971). Note that the more stringent standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that California must determine that its standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. In the 1990 amendments to section 209, Congress established section 209(e) and similar language in section 209(e)(1)(i) pertaining to California's nonroad emission standards which California must determine to be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

<sup>14</sup> See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) ("MEMA I").

<sup>15</sup> See "California State Motor Vehicle Pollution Control Standards; Amendments Within the Scope of Previous Waiver of Federal Preemption," 46 FR 36742 (July 15, 1981).

to ensure that the federal government did not second-guess state policy choices. As the agency explained in one prior waiver decision:

It is worth noting ... I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to “catch up” to some degree with newly promulgated standards. Such an approach ... may be attended with costs, in the shape of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California’s judgments on this score.<sup>16</sup>

Similarly, EPA has stated that the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on “ambiguous and controversial matters of public policy” to California’s judgment.<sup>17</sup> This interpretation is supported by relevant discussion in the House Committee Report for the 1977 amendments to the Clean Air Act.<sup>18</sup> Congress had the opportunity through the 1977 amendments to restrict the preexisting waiver provision, but elected instead to expand California’s flexibility to adopt a complete program of motor vehicle emission controls. The report explains that the amendment is intended to ratify and strengthen the preexisting California waiver provision and to affirm the underlying intent of that provision, that is, to afford California

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<sup>16</sup> 40 FR 23102, 23103-23104 (May 28, 1975).

<sup>17</sup> *Id.* at 23104; 58 FR 4166 (January 13, 1993).

<sup>18</sup> *MEMA I*, 627 F.2d at 1110 (*citing* H.R. Rep. No. 294, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 301-302 (1977)).

the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.<sup>19</sup>

### *C. Burden and Standard of Proof*

As the U.S. Court of Appeals for the D.C. Circuit has made clear in *MEMA I*, opponents of a waiver request by California bear the burden of showing that the statutory criteria for a denial of the request have been met:

[T]he language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.<sup>20</sup>

The same logic applies to authorization requests. The Administrator's burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: "here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as 'arbitrary and capricious.'"<sup>21</sup> Therefore, the Administrator's burden is to act "reasonably."<sup>22</sup>

With regard to the standard of proof, the court in *MEMA I* explained that the Administrator's role in a section 209 proceeding is to:

[...] consider all evidence that passes the threshold test of materiality and ... thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown

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<sup>19</sup> *Id.*

<sup>20</sup> *MEMA I*, *supra* note 17, at 1121.

<sup>21</sup> *Id.* at 1126.

<sup>22</sup> *Id.* at 1126.

that the factual circumstances exist in which Congress intended a denial of the waiver.<sup>23</sup>

With regard to the protectiveness finding, the court upheld the Administrator's position that, to deny a waiver, there must be "clear and compelling evidence" to show that proposed enforcement procedures undermine the protectiveness of California's standards.<sup>24</sup> The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.<sup>25</sup>

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. EPA's past waiver decisions have consistently made clear that: "[E]ven in the two areas concededly reserved for Federal judgment by this legislation – the existence of 'compelling and extraordinary' conditions and whether the standards are technologically feasible – Congress intended that the standards of EPA review of the State decision to be a narrow one."<sup>26</sup>

#### *D. EPA's Administrative Process in Consideration of California's Portable Engine ATCM Amendment Request for Authorization*

On November 21, 2014, EPA published a *Federal Register* notice announcing its receipt of California's authorization request. In that notice, EPA invited public comment

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<sup>23</sup> *Id.* at 1122.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See, e.g.*, "California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption," 40 FR 23102 (May 28, 1975), at 23103.

on each of the Portable Engine ATCM amendments and an opportunity to request a public hearing.<sup>27</sup>

First, EPA requested comments on whether California's 2007, 2009, or 2010 Portable Engine ATCM amendments: (1) undermine California's previous determination that its standards, in the aggregate, are at least as protective of public health and welfare as comparable federal standards; (2) affect the consistency of California's requirements with section 209 of the Act; or (3) raise any other new issues affecting EPA's previous authorization determinations. EPA also requested comments on whether the 2007, 2009, or 2010 Portable Engine ATCM amendments meet the criteria for a full authorization should any party believe that the amendments are not within the scope of the previous authorization.

EPA received no comments and no requests for a public hearing. Consequently, EPA did not hold a public hearing.

## **II. Discussion**

### *A. Within-the-Scope Discussion*

CARB maintains that the amendments noted above meet all three within-the-scope criteria, i.e. that the amendments: (1) do not undermine the original protectiveness determination underlying California's Portable Engine ATCM regulations; (2) do not affect the consistency of the Portable Engine ATCM regulations with section 209, and (3) do not raise any new issues affecting the prior authorization.<sup>28</sup> We received no adverse

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<sup>27</sup> See "California State Nonroad Engine Pollution Control Standards; Portable Diesel-Fueled Engines Air Toxics Control Measure; Request for Confirmation That Amendments Are Within-the-Scope of Previous Authorization; Opportunity for Public Hearing and Comment," 79 FR 69462 (November 21, 2014).

<sup>28</sup> "Request for Authorization Action Pursuant to Clean Air Act Section 209(e) for 2007, 2009, and 2010 Amendments to California's Airborne Toxic Control Measure for Portable Diesel Engines 50 Horsepower and Greater" (September 15, 2014), ("California Authorization Support Document"), at 10-14 [publicly available at [www.regulations.gov](http://www.regulations.gov) website, docket number EPA-HQ-OAR-2014-0798-0002].

comments or evidence suggesting a within-the-scope analysis is inappropriate, or that these Portable Engine ATCM amendments fail to meet any of the three criteria for within-the-scope confirmation.

With regard to the first within-the-scope prong, CARB maintains that the stringency of its emission standards is, in the aggregate, at least as protective of public health and welfare as applicable federal standards, especially since there are no federally applicable standards regulating in-use nonroad engines.<sup>29</sup> No comments presented otherwise, and EPA agrees that there are no federally applicable standards for in-use nonroad engines and that no evidence exists in the record to demonstrate that CARB's Portable Engine ATCM regulations, in the aggregate, are less protective than applicable federal standards. Therefore, we find that the Portable Engine ATCM amendments, as noted, do not undermine the protectiveness determination made with regard to the original Portable Engine ATCM authorization.

With regard to the second within-the-scope prong (consistency with section 209), CARB first maintains that the Portable Engine ATCM amendments do not regulate new motor vehicles or motor vehicle engines and so are consistent with section 209(a).<sup>30</sup> Likewise the Portable Engine ATCM amendments do not regulate any of the permanently preempted categories of engines or vehicles (e.g., new locomotives, engines for new locomotives, or new nonroad engines less than 175 horsepower used in farm and construction equipment and vehicles), and so are consistent with section 209(e)(1).<sup>31</sup> CARB maintains that the Portable Engine ATCM amendments do not cause any technological feasibility issues or cause inconsistency between state and federal test

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<sup>29</sup> California Authorization Support Document, at 11.

<sup>30</sup> California Authorization Support Document, at 11.

<sup>31</sup> California Authorization Support Document, at 11.

procedures, per section 209(b)(1)(C). Finally, CARB maintains that none of the 2007, 2009 or 2010 Amendments alter the test procedures specified for certifying engines, so there is no effect on the consistency with federal test procedures.<sup>32</sup> As mentioned above, no comments were received showing otherwise on any of these contentions. Because there is no evidence in the record to indicate that CARB's Portable Engine amendments are inconsistent with section 209, we cannot find that the noted Portable Engine amendments are inconsistent with section 209.

Regarding the third prong, California states that it is “not aware of any new issues affecting the previously granted authorization for the Portable Engine ATCM.”<sup>33</sup> There were also no comments arguing that any new issues have been raised affecting the previously granted authorization. CARB's 2007 Amendments and 2009 Amendments provide compliance flexibilities and regulatory relief that would not appear to raise any new issues affecting the previously granted authorization. Thus, we cannot find that the 2007 or 2009 Amendments raise any new issues affecting the previously granted authorization.

CARB's 2010 Amendments, however, include some new or stricter regulatory requirements, such as (i) requiring low-use and emergency use engines to be removed or replaced with a current tier engine by January 1, 2017 (which is earlier than originally required for some engine sizes), (ii) no longer allowing local air districts to permit non-certified engines that had operated between March 1, 2004 and October 1, 2006, and (iii) specifying PM emission factors for certain engines in order to help determine fleet average standards. These amendments will be referred to herein as the “New 2010

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<sup>32</sup> California Authorization Support Document, at 14.

<sup>33</sup> California Authorization Support Document, at 14.

Requirements.” Because these New 2010 Requirements raise new issues affecting the authorization previously granted for the Portable Engine ATCM, the New 2010 Requirements are not considered within the scope of the prior authorization, and will need to be evaluated for a full authorization.<sup>34</sup>

In summary, for the 2007 and 2009 Amendments, we find that California has met the three criteria for a within-the-scope authorization approval, and these amendments are thus confirmed as within the scope of the previous EPA authorization of California’s Portable Engine ATCM regulations. For the 2010 Amendments, while most of the 2010 amendments are within the scope of the previous authorization, the New 2010 Requirements are not within the scope of the prior authorization, and we will proceed to determine whether the New 2010 Requirements qualify for full authorization.

*B. Full Authorization Discussion for the New 2010 Requirements*

As described in the background section, the CAA directs EPA to grant authorization, unless EPA makes one of three possible findings: (1) that California’s protectiveness determination is arbitrary and capricious, (2) that California does not need state standards to meet compelling and extraordinary conditions, or (3) that the California standards and accompanying enforcement procedures are not consistent with section 209 of the Act. As mentioned above, the New 2010 Requirements to be evaluated for full authorization include the amendments requiring low-use and emergency use engines to be removed or replaced with a current tier engine by January 1, 2017, the amendments no

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<sup>34</sup> Because the New 2010 amendments create both new and more stringent emission requirements on the regulated parties, which are the type of requirements otherwise preempted under section 209(e)(1), EPA considers such amendments to create “new issues” which require a full consideration of the authorization criteria under section 209(e)(2)(A). Minor amendments to previously waived standards that do not create additional burdens on the regulated parties are considered under the within-the-scope criteria by EPA. *See* 37 FR 14831 (July 25, 1972).

longer allowing local air districts to permit non-certified engines that had operated between March 1, 2004 and October 1, 2006, and the amendments specifying PM emission factors for certain engines in order to help determine fleet average standards.

Regarding the first possible finding, it is clear that California's standards are at least as protective of public health and welfare as applicable federal standards, especially since there are no federally applicable standards to regulate in-use nonroad engines.<sup>35</sup> No comments presented otherwise, and the New 2010 Requirements at issue make the standards more protective, not less. Therefore, we find that California's protectiveness determination is not arbitrary and capricious.

Regarding the second possible finding, California reasserts its longstanding position that the State continues to need its own nonroad engine program to meet serious air pollution problems.<sup>36</sup> CARB points out that California, particularly in the South Coast and San Joaquin Valley Air Basins, continues to experience some of the worst air quality in the nation.<sup>37</sup> We further note that the relevant inquiry under section 209(e)(2)(A)(ii) is whether California needs its own emission control program to meet compelling and extraordinary conditions, not whether any given standard is necessary to meet such conditions.<sup>38</sup> CARB's emission control program is a central part of California's efforts to improve its air quality, to meet its air quality goals and satisfy its State Implementation

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<sup>35</sup> California Authorization Support Document, at 11.

<sup>36</sup> California Authorization Support Document, at 14-16.

<sup>37</sup> California Authorization Support Document, at 15.

<sup>38</sup> Final 209(e) Rule, 59 FR at 36982. The Administrator has recognized that even if such a standard by standard test were applied to California, it "would not be applicable to its fullest stringency due to the degree of discretion given to California in dealing with its mobile source pollution problems." (41 FR 44209, 44213, (October 7, 1976); 49 FR 18887, 18892 (May 3, 1984).); *see also* EPA's 2009 GHG Waiver Decision wherein EPA rejected the suggested interpretation of section 209(b)(1)(B) as requiring a review of the specific need for California's new motor vehicle greenhouse gas emission standards as opposed to the traditional interpretation (need for the program as a whole) applied to local or regional air pollution problems

Plan obligations. No comments were submitted otherwise. Therefore, we cannot find that California does not need its state standards to meet compelling and extraordinary conditions in California.

The third and final possible finding upon which authorization could be denied is if the New 2010 Requirements are not consistent with “this section.” As discussed above, this requires evaluation of consistency with sections 209(a), 209(e)(1), and 209(b)(1)(C). To be consistent with section 209(a), the amendments must not apply to new motor vehicles or motor vehicle engines. CARB states that none of its Portable Engine ATCM requirements apply to new motor vehicles or motor vehicle engines.<sup>39</sup> No evidence has been received to the contrary. Second, to be consistent with section 209(e)(1) of the Act, the regulations must not attempt to regulate vehicles and engines permanently preempted from state regulation by section 209(e)(1), including new nonroad engines below 175 horsepower used in farm and construction equipment and vehicles, or new locomotives or locomotive engines. CARB states that none of its Portable Engine ATCM requirements apply to these preempted vehicles or engines.<sup>40</sup> Again, we received no evidence to the contrary. We therefore cannot find that the New 2010 Requirements are inconsistent with sections 209(a) and 209(e)(1).

Third, to be consistent with section 209(b)(1)(c), there must be adequate lead time to permit technological development for compliance with the new standards, and the state test procedures must not be made inconsistent with federal test procedures.

Regarding test procedures, CARB maintains that the amendments do not alter any test procedures, and EPA does not have comparable in-use standards and test procedures;

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<sup>39</sup> California Authorization Support Document, at 11.

<sup>40</sup> California Authorization Support Document, at 11.

thus, by definition, there is no inconsistency with federal test procedures.<sup>41</sup> No comments were received otherwise. We therefore cannot find that the New 2010 Requirements are inconsistent with federal test procedures.

Regarding the existence of adequate lead time, CARB maintains that the New 2010 Requirements do not require development of new technologies, and that EPA has already previously determined that California's applicable Tier 1 through Tier 4 off-road compression ignition engine standards are technically feasible,<sup>42</sup> thus there is no consistency issue presented with regard to lead time. As mentioned above, we received no comment or evidence contesting California's positions regarding the consistency criterion under section 209(b)(1)(c). The compliance date for low use and emergency use engines is nearly the same as the original compliance date, and the two other changes (i.e., elimination of discretionary permits by local air districts, and specification of PM emission factors used to calculate fleet average standards) likewise do not raise feasibility issues. Thus, we cannot find any evidence indicating that the New 2010 Requirements do not provide adequate lead time or are otherwise not technically feasible. We therefore cannot find that the New 2010 Requirements that we analyzed under the full authorization criteria are inconsistent with section 209 of the Act.

Having found that the New 2010 Requirements satisfy each of the criteria for full authorization, and having received no contrary evidence to contradict this finding, we cannot deny authorization of the amendments.

### **III. Decision**

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<sup>41</sup> California Authorization Support Document, at 14.

<sup>42</sup> California Authorization Support Document, at 13, *citing* 75 FR 8056, 8060 (February 23, 2010).

The Administrator has delegated the authority to grant California section 209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating CARB's amendments to its Portable Engine ATCM regulations described above and CARB's submissions for EPA review, EPA is granting a within-the-scope authorization for the Portable Engine ATCM 2007, 2009, and 2010 Amendments, other than the New 2010 Requirements (as specified above). In addition, EPA is granting a full authorization for the New 2010 Requirements.

This decision will affect persons in California and those manufacturers and/or owners/operators nationwide who must comply with California's requirements. In addition, because other states may adopt California's standards for which a section 209(e)(2)(A) authorization has been granted if certain criteria are met, this decision would also affect those states and those persons in such states. *See* CAA section 209(e)(2)(B). For these reasons, EPA determines and finds that this is a final action of national applicability, and also a final action of nationwide scope or effect for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

#### **IV. Statutory and Executive Order Reviews**

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. § 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. § 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. § 804(3).

Dated: December 1, 2015.

Janet G. McCabe,  
Acting Assistant Administrator,  
Office of Air and Radiation.

6560-50-P

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